provisions of the Land Code has only served to convince me that this appeal must be allowed and the Collector's order set aside for the following reasons: All land which is comprised in any entry in the Mukim Register is subject to the provisions of the Land Code, and is not capable of being transferred, transmitted, charged or otherwise dealt with, except in accordance with those provisions (section 55). What are those provisions in relation to a transfer? They are surely that any such transfer must, if it is to be recognised as having any validity, be (1) evidence by a memorandum of transfer duly executed in the prescribed form, and (2) recorded by the proper registering authority in the appropriate register: See definition of proprietor in section 2, and sections 42, 96, 110 and 113. Every one is agreed that the memorandum of transfer of the 19th of August, 1935, was duly executed in the prescribed form, but every one is also agreed that it cannot be registered in view of the provisions of section 85(ii). How, then, can it be treated as "in effect valid," when under the provisions of section 96 "no instrument until registered.....shall be effectual to pass any land or any interest therein"? The only answer I can think of is that it cannot be so treated, and in my opinion the only person who can now apply to be registered as the proprietor of the lot of land in question is the legal personal representative (when appointed) of the late Din bin Aripen: See section 155.

This really disposes of the matter before me, but I can imagine a reasonably puzzled Collector of Land Revenue saying, "Yes, I can understand a decision that an unregistered and unregistrable memorandum of transfer is ineffectual to pass this land or any interest in it, but what does sub-section (i) of section 107 of the Land Code mean and what 'rights or interests' can be rendered effectual under that section?" This is not an easy question to answer, but since I have spent several hours endeavouring to form some clear idea as to the scope and meaning of section 107, and since counsel has specially asked me to deal with it, I feel that I ought to attempt an answer. As a result, then, of my endeavours I have come to the conclusion that section 107 of the Land Code is only intended to provide a simple procedure for rectifying errors on the face of the register which have arisen owing to —

(a) fraud or misrepresentation on the part of the registered proprietor, chargee or lessee, or

[278] (b) registration of a forged instrument, or of an insufficient or void instrument, or

(c) the defeat of a proprietor's title by operation of law, or

(d) some mistake upon the part of the proper registering authority.

The effect of fraud and misrepresentation, forgery and the registration of an instrument or void instrument is dealt with in sub-sections (ii), (iii) and (iv) of section 42, and sub-section (i) of the same section provides that the title of a proprietor, chargee or lessee shall be indefeasible except as provided in those three sub-sections and in cases where it is defeated by opration of law [sub-section (iv)]. The (a), (b), and (c) above are thus supported by the express provisions of section 42 of the Land Code; and though section 230(e) enables the proper registering authority, upon such evidence as shall appear to him sufficient, to correct errors in documents of title or in memorials &c., it does not say how any person whose right or interest in the land has suffered by such an error is to apply to have the same corrected. I therefore apprehend that he, too, may apply to the Collector under section 107(i) if the value of the land in question does not exceed $3,000.

Time alone can show whether the views I have just expressed in regard to the scope and meaning of section 107 of the Land Code are correct. I feel no great confidence in them since they are entirely my own and owe nothing to the suggestions or arguments of learned counsel. I do feel confident, however, that section 107 does not allow an unregistered and unregistrable memorandum of transfer to be treated as effectual to deprive a registered proprietor of his "indefeasible" title and to confer another "indefeasible" title on someone else, as was done in this matter, and for that terse reason I must allow this appeal and with costs. It may be that the memorandum of transfer of the 19th of August, 1935, though deprived of any effect as a transfer by sections 85(ii) and 96 of the Land Code, may be good as a contract, and that an action for the specific performance of the same may lie against the legal personal representative of the late Din bin Aripen notwithstanding section 4(c) of the Specific Relief Act: See *Loke Yew* v. *Port Swettenham Rubber Co.*, [1913] App. Cas. 491, 500; and *Haji Abdul Rahman* v. *Mahomed Hassan*, [1917] App. Cas. 209, 214. But that very difficult question does not arise for consideration in this appeal.

Appeal allowed.

M. C. CORBETT v. IPOH TIN DREDGING, LTD.

[O.C.J. (Aitken J.) August 24, 1936]
[Perak Civil Suit No. 337 of 1934]

Costs — Taxation — Rule Committee (Supreme Court) Enactment, (Cap. 13), 1932, Rule No. 4, sub-r.71 and Schedule, items 208 and 258 — Discretion of Registrar as to quantum.

Under items 208 and 258 in the Schedule to 1932 Rule No. 4 made under the Rule Committee (Supreme Court) Enactment (Cap. 13), the quantum of costs is in the discretion of the Registrar and in an objection under 1932 Rule No. 4, sub-rule 71 the Judge will not vary the amount allowed on taxation unless the Registrar has made an obvious mistake, or has exercised his discretion capriciously or mischievously.

L. T. Williams for the plaintiff.

H. R. Rix for the defendants.

Aitken J.: This case was undoubtedly a difficult one, of great importance to the parties concerned and involving much labour on the part of all learned counsel engaged therein, whether as solicitors, or as advocates, or in both those capacities. Its trial before Howes J. occupied six and a half days in June and July, 1935, and on most of the issues of law and fact then placed before him the learned Judge found in the plaintiff's favour and adjudged that the defendant company should pay him seven eighths of his taxed costs. There was no appeal.

The result of that trial meant a great deal to the plaintiff, one way or the other, and in addition to Mr. L. T. Williams of Ipoh, who had prepared his case for the hearing, the plaintiff engaged the services of two other eminent members of the Bar to present his case before the learned Judge. As these two gentlemen have not only attained eminence in the legal profession, but are also resident and usually practising at places outside the State of Perak, their fees attending at a trial before the Supreme Court at Ipoh may fairly be described as special.

Now the parties have a right to be represented by any counsel they think fit to retain, and counsel have an equal right to insist on such fees as their skill, experience and reputation can command; but it does not follow that a successful party who has engaged the services of eminent counsel can put the whole expense of such engagements on the losing side. The doctrine of *vae victis* may be said to apply in law as in war, but not to the same extent. In law we insist on reason.

When the plaintiff's solicitors presented their bill of costs for taxation as between party

[279] [279] and party on the 18th of July, 1936, they claimed a total sum of $6,881 on account of the advocacy fees actually paid to the two eminent members of the Bar who had conducted the plaintiff's case before the learned Judge, and the Assistant Registrar allowed only a total of $2,116 in respect of this item which is less than the sum so expended by $4,765. In doing so he allowed $35 an hour for the leader and two thirds of that rate for his junior, and this appeal was made to me on the footing that the Assistant Registrar had followed Practice Note No. 5 of 1933 instead of exercising his own discretion as he ought to have done. This practice note reads as follows:—

"In the Supreme Court of the Federated Malay States Registry, Kuala Lumpur.

Practice Note No. 5 of 1933.

Taxation

1932 Rule No. 4: Schedule, item 208.

The fee allowed under this item will usually be calculated at the rate of $35 an hour or $140 for a day of 4 hours, and so on. This rate will apply to both the Court of first instance and to the Court of Appeal, but in the latter Court a fee not exceeding $200 a day may, in exceptional cases, be allowed.

R.S.C. No. 38/1933 N. A. Worley,
Registrar, Supreme Court,
F.M.S., Kuala Lumpur.

Kuala Lumpur, 7th March, 1933."

When the appeal came before me in Chambers on the 8th of August, 1936, in the presence of Mr. Williams for the plaintiff appellant and Mr. Rix for the defendants respondents, the Assistant Registrar also attended and informed us that he did not consider himself as bound by this Practice Note No. 5 of 1933, and had exercised his own discretion in fixing the fees to be allowed to the plaintiff's eminent counsel at $35 an hour and two thirds of $35 an hour respectively. This announcement cut most of the ground from under Mr. Williams' feet, because, whether the Assistant Registrar regarded himself as proceeding under item 208 or under item 258 of the costs in the Supreme Court Schedule to Rule 4 of 1932, in either case the fees to be allowed are in the Assistant Registrar's discretion. Being thus deprived of his main argument, Mr. Williams was driven to contend —

(a) that the Assistant Registrar, in the exercise of his discretion, had allowed too little, and

(b) that an appeal to the Judge in Chambers against a disallowance on taxation substitutes the Judge's discretion for that of the Assistant Registrar: see sub-section 71 of Rule 4 of 1932 which provides that "upon such appeal the Judge may make such order as he thinks fit."

He suggested that, in the circumstances of this case, a proper allowance to the leading counsel would be $70 an hour with a corresponding allowance of two thirds of that amount to his junior.

Mr. Rix had no difficulty in disposing of these contentions. He referred me to the notice under Order 65, rule 27(41) in the English "Yearly Practice of the Supreme Court, 1934," and cited the case of *Smith* v. *Effingham,* 50 E.R. 627. He contended that the fees to be allowed to the plaintiff's counsel were in the discretion of the Assistant Registrar, and not in mine; and that a Judge should never interfere with the discretion of a taxing officer upon a question of quantum unless he could be shown to have acted on some wrong principle or to have made some obvious mistake. As I could not see that the Assistant Registrar had acted on any wrong principle, or made any obvious mistake, or exercised his discretion capriciously or mischievously, I dismissed the appeal because I had already received his assurance that in disallowing so large a part of the fees actually paid to the plaintiff's eminent counsel he had exercised his own discretion and not merely obeyed the somewhat imperative expressions contained in Practice Note No. 5 of 1933.

It is at the request of both Mr. Williams and Mr. Rix that this written ruling has been given, since I understood from them that the question raised by this appeal is of great interest and importance to the legal profession throughout Malaya. I have therefore decided to hazard a few further remarks in explanation of my rejection of the plaintiff appellant's appeal. Had I come to the conclusion that the Assistant Registrar was merely following Practice Note No. 5 of 1933 in making the disallowance that he did, I should have ordered him to disregard its somewhat imperative advice and exercise his own discretion instead. Had I come to the conclusion that he had made any obvious mistake, or had exercised his discretion capriciously or mischievously, I should have directed him as to the proper limits within which, in my opinion, his discretion should be exercised. But none of these possibilities was established before me, and I am clearly of opinion that sub-rule 71 of Rule 4 of 1932 does not allow me, on appeal, to substitute my discretion for that of the Assistant Registrar. To my mind the principle which should guide Registrars and Assistant Registrars in taxing fees paid to eminent counsel who cannot, or will not appear in Court without special remuneration is this:—

[280] Only so much should be allowed as would [280] be regarded by a competent local practitioner as an adequate reward for his services as an advocate in the particular case under consideration. Opinions

on such a point may differ, but it is the opinion of the Registrar (or Assistant Registrar) that the law provides shall count unless, as I have said before, he can be shown to have made some obvious error, or to have exercised his discretion in that regard capriciously or mischievously, or simply to have followed some one else's advice or instructions and not to have exercised any discretion at all. A reference to Order 65, rule 27 (44, 45 and 48) of the Rules of the English Supreme Court will serve to mitigate any disappointment that may be felt at the rejection of this appeal.

Appeal dismissed.

In re S.N.V.S.M. LETCHUMANAN CHETTY

Ex parte R.M.K.R.V. FIRM

[O.C.J. (de Buriatte J.) October 12, 1936]
[Perak Bankruptcy No. 15 of 1936]

Enforcement of Bankruptcy Orders — Set-off — Civil Procedure Code (Cap. 7), ss.92(ii), 253, 262 and 343 and Bankruptcy, r.67.

The *R.* firm had obtained a decree for $3,821.69, interest and costs against *L.* in Kuala Lumpur in 1932, which, being unsatisfied, had been sent to Ipoh for execution. The *R.* firm took bankruptcy proceedings against *L.*, which were dismissed with costs. When the costs were taxed, the *R.* firm applied for execution by set-off of the costs, which amounted to $946.75, against their decree, and *L.* issued a judgment debtor summons on the managing partner of the *R.* firm. The Registrar adjourned the application for execution to the Judge and the application and summons were heard together.

Held: following *Re Chong Fong Sen; ex parte Phuman Singh,* [1931-32] F.M.S.L.R. 340; [1932] 1 M.L.J. 140, that the set-off should be allowed, and the judgment debtor summons was therefore bad.

F. A. Briggs (*G. Terrell* with him) for the R.M.K.R.V. Firm:

The application for execution is *ex parte,* but affects the validity of the judgment debtor summons. The bankruptcy order and allocatur are together enforceable as a "judgment" Bankruptcy Rule 67. This rule is copied from English Bankruptcy Rule 91 and "judgment" has its English meaning. It is for this purpose the equivalent of a decree under the Civil Procedure Code, sections 2 and 216 to 221. Judicature Act, 1925, section 225. *L.* has correctly treated his order as a decree by taking out a judgment debtor summons under section 343, Civil Procedure Code. The bankruptcy order is therefore subject to set-off under section 262 of the Civil Procedure Code as if it were a cross decree. The judgment debtor summons is an application for execution and the conditions of section 262 are fulfilled; but where it is sought to obtain set-off an application by the holder of the smaller decree is not in any event necessary. The section is mandatory. It overrides rights of third parties in the bankruptcy order. *Re Chong Fong Sen, supra,* shows that the English rules as to set-off in bankruptcy matters do not apply in this country. The Court here is sitting both in bankruptcy and in its ordinary civil jurisdiction.

B. K. Das for S.N.V.S.M. Letchumanan Chetty. Section 262 is applicable only where there are two suits. The bankruptcy proceeding is not a suit. The judgment debtor summons is not an application for execution, which can only be made under section 253 of the Civil Procedure Code. The absenceof such application renders section 262 inapplicable. The judgment debtor summons, although issued under section 343, is a proceeding in bankruptcy and the decrees are not in the same Court for the purposes of set-off. English authorities show that the rule against set-off is based in part on the rights of solicitors to a lien: *Re Adams* (1880) 14 Ch. D. 37; *Re Bassett* [1896] 1 Q.B. 219, and *Re Drummond,* [1909] 2 K.B. 622. No set-off is allowed on insolvency proceedings in India though the Civil Procedure Code applies. *Mulla* on Insolvency. Insolvency Rules 44 and 203. Section 92(ii) of the Civil Procedure Code shows that set-off is subject to solicitors' lien. Here there is an equitable lien, or an equitable right in the order.

[De Buriatte J. — Cases such as *Pringle* v. *Gloag* (1879) 10 Ch. D. 676 show that there may be an equitable set-off].

The solicitors' right is to be preferred. *Ex parte Wagner,* 2 F.M.S.L.R. 10. *Re Chong Fong Sen, supra,* was an application for equitable set-off. Here I have the better equity.

F. A. Briggs in reply.

De Buriatte J.: The Court is now sitting both in bankruptcy and in what I may loosely call its common law jurisdiction. Cases such as *Re Bassett, supra,* depend on the antagonistic relations obtaining before the Judicature Acts between the different superior Courts in England and their reluctance to give effect to one another's orders. They are therefore inapplicable in this country, though in England they were saved by the provision of the Judicature Acts that the old practice should continue in force, unless expressly altered. The bankruptcy order, with the allocatur made thereunder, is for all purposes of its enforcement to be considered as equivalent to a decree. There are therefore two decrees capable of execution in the same Court at the same time. I am of opinion that the decision in *Re Chong Fong Sen, supra,* was right and shall follow it. The R.M.K.R.V. firm's application for execution by setting off under section [281] 262 of the Civil Procedure Code the monies due by the firm to Letchumanan under the bankruptcy order and allocatur will be allowed. Satisfaction will be entered upon the bankruptcy order and allocatur. It follows that there is then no unsatisfied decree upon which the judgment debtor summons could issue, and it is therefore bad and will be struck out. Costs must follow the event. [281]

Order accordingly.

FOO YIN FONG & ANOR. v. YEW CHEE SEONG

[C.A. (Terrell Ag. C.J., Whitley Ag. C.J. (S.S.) and Aitken J.) September 9, 1936]
[Perak Civil Appeal No. 10 of 1936]

Mining Enactment (Cap. 147), s.97 — Powers of Warden to cancel sub-lease — Effect of Tin and Tin-ore (Restriction) Enactment (Cap. 95) on such powers.

Although the powers of the Warden of Mines under section 97 of the Mining Enactment (Cap. 147) have been necessarily modified by the coming into force of the Tin and Tin-ore (Restriction) Enactment (Cap. 95) the Warden's discretionary power to cancel sub-leases under and in accordance with the provisions of that section still survives.